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SERVICE DATE – LATE RELEASE SEPTEMBER 24, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

MOTION FOR PROTECTIVE ORDER

Decided: September 24, 2014

This decision grants a motion for a protective order in these related proceedings.

These proceedings involve an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in an urban area of Jersey City, N.J. The Harsimus Branch extends between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City.¹ In a decision served on August 11, 2014, the Board vacated the stay it had issued on April 20, 2010, and reinstituted these proceedings. In the August 11 decision, the Board determined that these abandonment and discontinuance proceedings are within the jurisdiction of the Board. The August 11 decision also granted the request of a group of limited liability companies (LLCs)² to intervene, and discussed the preparation of a Supplemental

¹ Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009).

² The LLCs are described as: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

Environmental Assessment (Supplemental EA) by the Board's Office of Environmental Analysis.

On September 15, 2014, CNJ Rail Corporation (CNJ), a non-party to these proceedings, filed a motion for protective order. CNJ states that it received discovery requests from the City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties) and the LLCs³ on September 10, 2014. CNJ states that the City of Jersey City introduced an ordinance expressly authorizing the City Managers, acting on behalf of the City, to take all necessary steps to file a formal Offer of Financial Assistance (OFA) in these proceedings. While the final vote has not yet been scheduled, according to CNJ, CNJ states that the OFA authorization ordinance and the Board's OFA procedures are the driving force behind the discovery requests and that the information provided would likely be used for an OFA. CNJ states that in order to accommodate the LLCs' and City Parties' requests for document production, it is requesting expedited consideration. Included with its motion are a proposed protective order and undertakings. According to CNJ, granting the motion will facilitate the disclosure and use of confidential and commercially sensitive material in these proceedings.

Good cause exists to grant the motion for protective order. Issuance of the protective order will ensure that confidential and highly confidential information will be used solely for the purpose of preparing to file and/or filing an OFA in these proceedings and not for other purposes. Further, the motion conforms with the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain the confidentiality of materials submitted to the Board. Accordingly, the motion for protective order will be granted, and the protective order and undertakings are adopted for this proceeding, as modified in the Appendix to this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion for a protective order is granted, and the protective order and undertakings, as modified in the Appendix to this decision, are adopted.
2. The parties are directed to comply with the protective order set forth in the Appendix to this decision.
3. Materials designated as confidential or highly confidential will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the

³ The document requests by City Parties and the LLCs were attached to the motion as Exhibits 1A and 1B, respectively.

appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

4. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. Any party¹ producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 12.
 - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.
 - (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.

¹ The term “party” as used in this Protective Order is not limited to parties to this proceeding, but includes both parties and non-parties producing and receiving documents, data, and other materials pursuant to discovery requests in this proceeding.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the “HIGHLY CONFIDENTIAL” material. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).
3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written

request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
7. To the extent that “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material is produced by a party in these or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of these and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within three working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the

producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.

11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party, if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
12. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING
CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on September 24, 2014, governing the production of confidential documents in AB 167 (Sub-No.1189X), et al., understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than for filing or preparing to file an Offer of Financial Assistance in connection with AB 167 (Sub-No.1189X), et al. or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of these proceedings and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated:_____

UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I, _____, have read the Protective Order served on September 24, 2014, governing the production of highly confidential documents in AB 167 (Sub-No.1189X), et al., understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL” that I will limit my use of those documents and the information they contain to filing or preparing to file an Offer of Financial Assistance in connection with this proceeding and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing “HIGHLY CONFIDENTIAL” information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party name]

Dated: _____